No. 88-2138

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ILEENE GRAY, formerly ILEENE HEFFRON,
Petitioner,

v.

HARRY ROTH, Fiduciary of the Estate of
Joseph Heffron, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

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QUESTION PRESENTED FOR REVIEW

Are the courts of a sister state compelled under the Full Faith and Credit clause of the U.S. Constitution to enforce the property settlement provisions of a foreign divorce decree where the forum court has found that it has personal jurisdiction over the parties, and the exercise of such jurisdiction is consistent with constitutional due process standards and the absence of fraud in invoking such jurisdiction.

LIST OF PARTIES

The only parties to the proceedings below were the Petitioner Ileene Gray, formerly Ileene Heffron as Claimant-Appellant and Harry Roth, Fiduciary of the Estate of Joseph Heffron as Defendant-Appellee.

The respondent before this Court is Harry Roth, Fiduciary of the Estate of Joseph Heffron.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

The petitioner Ileene Gray respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Iowa, entered in the above-entitled proceeding on January 26, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals of Iowa is reported at 438 N.W.2d 25, and is reprinted in the appendix hereto. (App.1). Petitioner applied for further

review of the Court of Appeals decision by the Iowa Supreme Court, but the Iowa Supreme Court by memorandum order entered March 31, 1989 denied this request for further review. This memorandum decision is unreported, but is reprinted in the appendix hereto. (App. 16).

The trial court decision of the District Court of Iowa for Scott County is unreported, but is reprinted in the appendix hereto. (App. 17).

JURISDICTION

Petitioner originally brought suit in the District Court of Iowa for Scott County to enforce a property settlement award made in her Arkansas devorce decree against the estate of her deceased former husband. Following trial, the Iowa District Court on September 29, 1987 refused to enforce Petitioner's adjudicated property rights in co-owned savings bonds, holding that the Arkansas

divorce court did not have personal jurisdiction over the decedent. (App. 30).

On appeal the Iowa Court of Appeals affirmed the trial court's dismissal of Petitioner's claim based upon her Arkansas divorce decree on January 26, 1989. (App. 1). The Iowa Supreme Court denied Petitioner's application for further review on March 31, 1989. (App. 16).

The jurisdiction of this Court to review the judgment of the Iowa Court of Appeals is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S.CONST. art. 4, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

STATEMENT OF THE CASE

Petitioner and Respondent's decedent were married on August 3, 1977. At the time of the marriage decedent was sole

owner of substantial U.S. Savings bonds. After the marriage the bonds were reissued in both Petitioner's and decedent's names as co-owners.

Following decedent's departure from their joint residence in Arkansas in late May 1978, Petitioner commenced divorce proceedings in Arkansas on June 2, 1978, and secured a restraining order enjoining each party from disposing of any property belonging to the parties. After unsuccessfully attempting to serve decedent within Arkansas with notice of the divorce proceedings, Petitioner learned that decedent had gone to Iowa and she had him served by registered mail in July 1978. Decedent never filed a formal appearance in the Arkansas divorce proceeding, but he retained an Iowa attorney who negotiated via mail with Petitioner's attorney in Arkansas.

Decedent and Petitioner, via their

attorneys' correspondence, reached an impasse over property settlement issues and decedent's desire to reconcile the marriage, and Petitioner proceeded to procure a default divorce decree on September 14, 1978. The Arkansas decree provided that the bonds should remain jointly owned. However, without notice to either Petitioner or the Arkansas court, decedent cashed in the bonds in Iowa between July 31 and August 22, 1978.

The Arkansas court in its decree found that both parties were residents of Arkansas and that the court had jurisdiction over both parties. Petitioner made no attempt to secure her share of the co-owned bonds until she learned of decedent's death in Iowa on February 3, 1984. She filed a claim against decedent's estate and attempted to enforce her entitlement to her share of the bonds pursuant to her Arkansas divorce decree.

The Iowa trial court rejected Petitioner's claim and held that the property division terms of the decree were void because the Arkansas court did not have personal jurisdiction over decedent at the time its decree was entered. (App. 30).

The Iowa trial court, in dismissing Petitioner's claim, ignored the express findings of the Arkansas divorce court as to the joint Arkansas residence of the parties and that court's conclusion as to jurisdiction over both parties even though service on the decedent was by constructive notice. The trial court held that constructive notice of the Arkansas divorce proceedings as a matter of law was insufficient to confer personal jurisdiction over the decedent. (App. 30).

On appeal, the Iowa Court of Appeals recognized that the Arkansas court had made express findings as to its

jurisdiction over the person of the decedent, but the appellate court relied on an analysis of hornbook law to affirm the trial court's refusal to accord Full Faith and Credit to the Arkansas decree. (App. 7-11). The Court of Appeals quoted hornbook law for the proposition that a state has power to exercise judicial jurisdiction over a person if the person's relationship to the state is such that the exercise of jurisdiction is reasonable, citing Restatement (Second) of Conflicts, Section 24(1). Further citing hornbook law, the Iowa Court of Appeals found that the only sufficient relationships include: presence in the state; domicile; residence; consent; and personal appéarance. (App. 7).

Looking to the trial court's record, the Iowa Court of Appeals found sufficient evidence to support the trial court's conclusion that the decedent had

an Iowa domicile, and not an Arkansas domicile when he was served with constructive notice of the Arkansas divorce proceeding. Since it could find no other "sufficient relationship" to support the Arkansas court's exercise of jurisdiction, the Iowa Court of Appeals affirmed the trial court's dismissal of Petitioner's claim.[1]

The controlling federal question of the application of the constitutional mandate of Full Faith and Credit to Petitioner's property award in her Arkansas divorce decree was raised both in the trial court and on appeal. The trial court held that it could avoid the mandate since there was only constructive service

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1 The Court of Appeals also affirmed the trial court's dismissal of Petitioner's claim based upon a state law gift theory. However, the latter is strictly a matter of the application of state law and does not present a Federal constitutional issue for review.

of process on the decedent, which did not give the Arkansas court personal jurisdiction over the decedent. (App. 30). This constitutional issue was raised on appeal, but the Iowa Court of Appeals affirmed its trial court's failure to accord Full Faith and Credit to the Arkansas award by holding that there was no jurisdictional predicate for the Arkansas court since at the time of his constructive and actual service of process in Iowa, decedent had changed his residence/domicile from Arkansas to Iowa. (App. 10-11).

REASONS FOR GRANTING THE WRIT

I.

THE IOWA COURT'S FAILURE TO RECOGNIZE THE "LONG ARM" JURISDICTION OF ARKANSAS DIVORCE COURTS OVER PARTIES WHOSE MATRIMONIAL DOMICILE IS ARKANSAS (a) VIOLATES THE CONSTITUTIONAL MANDATE TO GIVE FULL FAITH AND CREDIT TO THE JUDICIAL PROCEEDINGS OF SISTER STATES, AND (b) CONFLICTS WITH THE DECISIONS OF ALL OTHER STATE SUPREME COURTS THAT HAVE CONSIDERED THE ISSUE.

In upholding its trial court's denial of Full Faith and Credit to the property division terms of Petitioner's Arkansas divorce decree, the Iowa Court of Appeals cited only a partial hornbook listing of "sufficient relationships" to justify a state court's exercise of personal jurisdiction over an absent defendant. (App. 7). It is appropriate to note that even under the hornbook authority relied on by the Iowa Court of Appeals (but in a section ignored by the Iowa court), "long arm" jurisdiction over defendants absent from the physical boundaries of the forum state is recognized. Restatement of Conflicts (Second), Section 36(2) provides:

> "A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to

other states make the exercise of such jurisdiction unreasonable."

This court has defined the permissible due process bounds of a state court's exercise of jurisdiction, and has specifically recognized the validity of the exercise of "long arm" jurisdiction over foreign defendants when the defendant has "certain minimum contacts with (the forum) such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." McGee v. International Life Insurance Co., 355 U.S. 220, 222 (1957).[2]

While this court has not addressed the fact situation before the Iowa court

2 In McGee this court recognized the close relationship between the proper "due process exercise of jurisdiction and the concomitant obligation of a sister state to grant "full faith and credit" to a decree embodying the exercise of such jurisdiction, as it noted: "It is not controverted that if the California court properly exercised jurisdiction over respondent the Texas courts erred in refusing to give its judgment full faith and credit. 355 U.S. at 221.

where the acts or minimum contacts asserted in favor of jurisdiction amount to the maintenance of a matrimonial domicile, six other state supreme courts have considered this factual context and uniformly sustained the exercise of long-arm jurisdiction over spouses who have recently absented themselves from the state of matrimonial domicile.

In Whitaker v. Whitaker, 230 S.E.2d 486 (Georgia 1976), the Georgia Supreme Court gave constitutional recognition to an express Florida domestic relations long-arm jurisdictional statute giving the Florida courts jurisdiction over the person of a defendant (whether or not a resident or citizen of Florida) in domestic relations actions if the defendant "maintains a matrimonial domicile in (Florida) at the time of the commencement of this action, or if the defendant resided in (Florida) preceding

the commencement of the action . . ." 230 S.E.2d 486. In Whitaker, the wife of a Florida couple moved with the couple's child to Georgia, and the Florida husband commenced a Florida divorce action. The absent wife was served with notice of the Florida proceeding at her new residence in Georgia, but made no response to Florida process and made no appearance in the Florida court. By default the Florida court not only granted the divorce sought but adjudicated child custody, child support and property division issues. The Georgia spouse in Whitaker later filed her own divorce action in Georgia, and the Georgia Supreme Court held that the prior Florida divorce was entitled to full faith and credit respecting all issues adjudicated. In tracing the evolution of "long arm" jurisdiction since this court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), the

Georgia court concluded:

> "In a country comprising fifty state judicial systems plus the District of Columbia's system, in an age of great mobility of persons and families, and in an era of vastly increasing domestic relations litigation, it seems to this court that the minimum contacts concept of in personam jurisdiction is particularly suited, as a matter of practicality, to the resolution of issues in domestic relations litigation." 230 S.E.2d at 448.

The Arkansas Supreme Court has itself recognized long-arm personal jurisdiction in matrimonial actions over spouses who depart the state after the state has been established as the couples' last matrimonial domicile. Bunker v. Bunker, 552 S.W. 2d 641 (Arkansas 1977).[3] Similarly in Dillon v. Dillon, 176 N.W. 2d

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3 The Arkansas court reached this conclusion applying its general "long-arm" jurisdiction statute referencing "any cause of action arising out of acts done by an individual in Arkansas," 552 S.W.2d at 643, whereas other state supreme courts have reached similar conclusions of personal jurisdiction over absent defendants predicated on specific domestic relations long-arm statutes.

362 (Wisc. 1970), the Wisconsin Supreme Court held that a defendant husband who had lived in Wisconsin in a marital relationship at least six consecutive months within the six years preceding commencement of a Wisconsin divorce action by his wife had sufficient contacts with the state to allow in personam jurisdiction to attach. Likewise, the California appellate court has upheld personal jurisdiction over absent defendants in domestic relation actions where California was the matrimonial domicile prior to defendant's departure. Soule v. Soule, 14 Cal.Rptr. 417 (Cal. App. 1961).

Other State Supreme Courts have held that recognition of matrimonial property rights adjudicated by their sister states pursuant to the exercise of long-arm jurisdiction is required by the constitutional mandate of full faith and

credit. See Mizner v. Mizner, 439 P.2d 679 (Nev. 1968), cert. denied 393 U.S. 847, rehearing denied 393 U.S. 972 (1968). (enforcing alimony provisions from a California divorce decree on a spouse who had relocated from California and been served in Nevada), and Mitchim v. Mitchim, 518 S.W.2d 362 (Texas 1975) (holding that an Arizona divorce court may adjudicate personal judgments for alimony and attorneys fees where a former Arizona resident has moved to and been served in Texas).

Thus the Iowa Court of Appeals decision below, refusing to give recognition to the property award of an Arkansas divorce court, where Arkansas had substantial contacts with the decedent as the state of last matrimonial domicile, is in conflict with the recognition of full faith and credit accorded by all other state supreme courts that have considered

the exercise of long-arm jurisdiction in matrimonial cases. Only the exercise of this Court's historic supervisory role in policing conflicting interpretations of Federal constitutional issues can prevent the evolution of further conflicting authority, and a legal development where the enforceability of judicial decrees that fully meet due process muster will be determined by the accident of geography rather than uniform constitutional policy.

II.

THE IOWA COURT'S TOLERANCE OF ITS TRIAL COURT'S PLENARY RE-EXAMINATION OF DOMICILE AS A BASIS FOR A SISTER STATE'S EXERCISE OF JURISDICTION CONFLICTS WITH DECISIONS OF THIS COURT MANDATING RECOGNITION OF FULL FAITH AND CREDIT.

The trial court refused to acord full faith and credit to Petitioner's Arkansas decree because it held as a matter of law that personal jurisdiction over an absent defendant could not be gained by constructive service of process.

(App. 30). This holding contradicts this Court's historic ruling in Milliken v.Meyer, 311 U.S. 457, 462 (1940), holding that a state may properly exercise personal jurisdiction via constructive service on a defendant who is a domicilary of the forum state.

The Iowa Court of Appeals affirmed the trial court's nonrecognition of the Arkansas court's personal jurisdiction over the decedent, by holding that the Iowa trial court could freely re-examine the jurisdictional issue of residence or domicile of the decedent even though that issue had been decided by the Arkansas court. The Iowa Court of Appeals cited as authority for this free re-examination of domicile only a hornbook, Restatement (Second) of Conflicts. (App 10-11).

The Restatement itself cites as authority for re-examining domicile jurisdiction issues this court's holding

in Williams v. North Carolina, 325 U.S. 226 (1945). Restatement (Second) of Conflicts, Section 71 comment b. Williams did allow sister states to separately litigate the threshold jurisdictional issue of domicile before enforcing foreign state judgments or decrees via the full faith and credit mandate of the constitution. However, the Williams court relied for its majority concensus on the three-judge concurring opinion authorizing such jurisdictional questioning only in the context where the presumptive jurisdiction of the original judgment was successfully attacked via "overwhelming evidence satisfying whatever standard of proof may be propounded" (that jurisdiction "was acquired fraudulently, deceitfully or in bad faith"). 325 U.S. at 240-241.

Rather than accord presumptive validity to the Arkansas court's

determination that both parties were Arkansas residents at the time of the 1978 divorce decree, the Iowa Court of Appeals reviewed its trial court record evidence of domicile "in the light most favorable to the trial court's judgment" that decedent had changed his domicile back to Iowa following his Arkansas matrimonial co-residence with Petitioner. (App. 4). Thus the Iowa Court of Appeals summarized all evidence supporting an Iowa domicile and found it "sufficient" to support its trial court's conclusion of Iowa domicile. (App. 8-10). The uncontroverted record evidence from three sources (Petitioner's testimony, Respondent's testimony and the correspondence authored by the Iowa attorney retained by decedent to negotiate with Petitioner's Arkansas divorce attorney) supported a conclusion that decedent was interested in reconciling his marital rift with Petitioner and returning

to Arkansas up until the time the Arkansas divorce decree was finalized. The Iowa Court of Appeals ignored this evidence because it felt obliged only to examine the record for sufficient supporting evidence to substantiate its trial court's judgment. While this is a normal standard of appellate review for correction of errors of law, it does not take into account the higher constitutional standards of proof mandated by Williams for challenging foreign court judgments as to their own adjudications of jurisdictional facts.

This court should clarify the context for the continuing validity of Williams-type challenges to jurisdiction within the system of co-sovereign states. The concurring opinion in Williams sets out two principles for policing such challenges. First, there must be an elevated standard of proof, beyond a bare

preponderance of evidence, to upset a constitutional presumption of validity. Second, the collateral attack must be based upon a showing akin to fraud, deceit or bad faith in proving up the facts establishing the jurisdictional predicate in the original court. See 325 U.S. at 240-41. These factors focus on the essential integrity of the prior state's adjudication process, and not the merits of the particular adjudication.[4]

Subsequent to Williams this court has further narrowed the ambit wherein foreign courts can, consistent with Full Faith and Credit, question the jurisdiction of a

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4 By contrast the Iowa trial court was essentially interested in re-trying the equities of the original divorce by its own standards. At the very end of its opinion the trial court stated its own conclusion that a more equitable property division (than that adjudicated by the Arkansas divorce court) for this "short-lived" marriage would involve decedent getting all of the bonds that the Arkansas court had determined to be joint property. (App. 32-33).

sister state court's judgment. In Johnson v. Muelberger, 340 U.S. 581 (1951) this court held that no collateral attack on a foreign divorce decree would be allowed under the Full Faith and Credit constitutional mandate, where the party attacking the decree had no standing to attack the decree in the state where the decree was issued.

Neither the trial court, nor the Court of Appeals, made any threshhold finding or conclusion establishing the respondent fiduciary's ability to so litigate a jurisdictional challenge in Arkansas, notwithstanding that in light of the presumptive validity of the Arkansas decree, the burden of proof was on the party contesting validity. Without such a finding or conclusion, the fiduciary is constitutionally barred from refusing to give full faith and credit to the Arkansas decree.

In this case focus is on the narrow issue of decedent's domicile, but not respecting the Arkansas court's basic subject matter jurisdiction over the parties' divorce or their property within Arkansas, which jurisdiction is conceded. Rather focus is on decedent's domicile for determining whether that court could exercise its plenary jurisdiction over decedent's person as a temporarily absent resident. On this issue the Arkansas court entered its judgment on the merits after giving its putative resident actual notice and opportunity to defend in the divorce action consistent with due process constitutional standards. Milliken v. Meyer, 311 U.S. 457 (1941). Under such circumstances it is likely that the Arkansas courts would hold the initial Arkansas determination to be res judicata respecting the issues of residence and domicile established therein, since it

found it had subject matter and personal jurisdiction, necessary for a determination of issues on the merits. See Restatement (Second) of Conflicts, Section 73 (1971).

Beyond res judicata principles, the equitable principle of laches as applied by the Arkansas courts might well bar the re-opening of the Arkansas decree in Arkansas. The decedent knew of the existence of the Arkansas decree, adjudicating his interest in the subject U.S. Savings bonds as of September 1978. A direct attempt by him, or his estate on his behalf, to invalidate that adjudication more than six years after its entry would likely be barred by laches. See generally Meadows v. Hardcastle, 242 S.W.2d 710 (Ark. 1951).

Lower courts in our Federal system need guidance from this court respecting the limits of their ability to ignore the

constitutional mandate of Full Faith and Credit for foreign decrees.

CONCLUSION

For the reasons above, this petition for certiorari should be granted.

Respectfully submitted,

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June 27, 1989.

APPENDIX

APPENDIX 1

IN THE COURT OF APPEALS OF IOWA

ILEENE GRAY, formerly **ILEEN (sic) HEFFRON**, Claimant-Appellant,	)	**F I L E D** Jan 26 1989 Clerk Supreme Court
vs.	)	
HARRY ROTH, Fiduciary of the Estate of **JOSEPH HEFFRON**, Defendant-Appellee.	)	8-246 87-1416

Appeal from the Iowa District Court for Scott County (No. 50559), James R. Havercamp.

Claimant appeals from a district court judgment determining that claimant had no interest in decedent's U.S. Savings Bonds. **AFFIRMED.**

Thomas C. Fritzsche, Bettendorf, for claimant-appellant.

Scott H. Walters of Walter Newport & Associates, Davenport, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Claimant appeals from a district court judgment determining that claimant had no interest in decedent's U.S. Savings Bonds. Claimant contends that the district court erred in: (1) finding that the property distribution provisions of the Arkansas divorce between claimant and decedent giving claimant an interest in the bonds were void for lack of in personam jurisdiction over the decedent; and (2) determining that decedent's act of making claimant a co-owner of the bonds after their marriage did not constitute a gift of one-half the value of the bonds.

Ileene and Joseph were married in Arkansas on August 3, 1977. At the time of the marriage, Joseph was sole owner of several U.S. Savings Bonds. After their marriage, Joseph had his bonds reissued in

his and Ileene's names as co-owners.

On May 24, 1978, Joseph returned to Iowa after having removed the savings bonds from the bank and taking one-half of the parties' checking account. Ileene commenced divorce proceedings in Arkansas on June 2, 1978, and secured a restraining order enjoining each party from disposing of any property belonging to the parties. Joseph was informed of the proceedings by certified mail in July 1978. Joseph never appeared in Arkanses, but did retain an Iowa attorney.

From July 31 until August 22, 1978, Joseph cashed the bonds. On September 14, 1978, Ileene received a default divorce decree which provided that the bonds should remain jointly owned. The Arkansas court indicated that it had jurisdiction over the parties. Ileene made no attempt to secure the bonds until this action.

Joseph died on February 3, 1984. On

September 4, 1984, Ileene filed this claim seeking recovery for her alleged interest in the U.S. Savings Bonds. The district court rejected Ileene's claim and she appeals.

Our standard of review in this probate matter is for correction of errors at law. Estate of Voelker, 252 N.W.2d 400, 402 (Iowa 1977). If the trial court's findings of fact are supported by substantial evidence and were not induced by an erroneous view of the law, they will stand. Id. We must construe the evidence in the light most favorable to the trial court's judgment, and this court will not weigh the evidence or pass on the credibility of witnesses. Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983). A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. Id.

I. The claimant contends the trial court erred in determining that the property distribution provisions of the Arkanses divorce decree between claimant and the fiduciary's decedent were void because the Arkansas court did not have in personam jurisdiction over the decedent. The defendant asserts that the trial court did not err.

An independent action may be maintained to determine property rights after the dissolution of the marital status by divorce where the divorce court does not have jurisdiction to determine property rights. 24 Am. Jur. 2d Divorce and Separation Section 686 (1983). Death of one of the parties does not bar the vacation of an invalid divorce decree for the purpose of establishing property rights. In re Roedell's Estate, 253 Iowa 438, 442, 112 N.W.2d 842, 844-45 (1962).

The general rule regarding a divorce issued in a foreign state is that the decree is presumptively entitled to full faith and credit unless it is affirmatively shown that the court did not have jurisdiction. Cooper v. Cooper, 217 N.W.2d 584, 586 (Iowa 1974). The burden of impeaching such a decree rests on the party who asserts its invalidity. Id.

There is no question that Arkansas had jurisdiction to dissolve the parties' marriage. See Restatement (Second) of Conflicts Section 71 (1971). However, at issue is the jurisdiction over the bonds. Without in personam jurisdiction, the Arkansas court could not order the bonds be held in co-ownership. See In re Marriage of Vogel, 293 N.W.2d 215, 216 (Iowa 1980). To the extent it purports to do so, the Arkansas decree is void if found to be lacking in personam jurisdiction. Vanderbilt v. Vanderbilt,

354 U.S. 416, 418, 77 S. Ct. 1360, 1362, 1 L. Ed.2d 1456, (1957).

The trial court found that constructive notice of the divorce proceedings was insufficient to confer in personam jurisdiction over decedent in an Arkansas court. A state has power to exercise judicial jurisdiction over a person if the person's relationship to the state is such that the exercise of jurisdiction is reasonable. Restatement (Second) of Conflicts Section 24(1). Sufficient relationships include: presence in the state; domicile; residence; consent; and personal appearance. Not finding a reasonable relationship between decedent and Arkansas, the trial court found in personam jurisdiction lacking.

The trial court correctly applied the law to the facts. First, there is no evidence of presence in the state at the

relevant time, consent, or personal appearance. Second, after the ten months decedent resided with the claimant in Arkansas, he returned to his residence in Iowa. Finally, since decedent did not intend to return to Arkansas, the trial court did not consider Arkansas his domicile. Therefore, none of the pertinent relationships existed to give Arkansas in personam jurisdiction.

This conclusion is supported by sufficient evidence. Decedent lived in Davenport, Iowa, for approximately ten years before moving to Alaska in 1942. He lived in Alaska with his wife, claimant's sister, until she died. From 1965 to 1977, decedent spent the winters in Texas and the summers in Iowa. Each spring and fall, he stopped on his way to visit the claimant in Arkansas.

From 1967 to 1982 (except for the ten months in Arkansas), decedent lived

in Iowa in his camper on property owned by the defendant, executor of the estate, in Clinton County. Due to declining health, in 1982 decedent moved to an apartment in DeWitt, Iowa. During this time, decedent used his or the executor's Iowa address for official matters such as his driver's license, mail, and tax returns.

A domicile once acquired continues until a new one is perfected by the concurrence of three essential elements: (1) a definite abandonment of the former domicile; (2) actual removal to and physical presence in the new domicile; (3) a bona fide intention to change and to remain in the new domicile permanently of indefinitely. Julson v. Julson, 255 Iowa 301, 305, 122 N.W.2d 329, 331 (1963).

Domicile is largely a matter of intent, the intent to remain permanently

or indefinitely in the location. Id. The intention to change one's domicile must be a present and fixed intention and not dependent upon the happening of some future or contingent event.

Decedent resided in Arkansas from approximately August 3, 1977, when he was married to claimant, until May 24, 1978, when they separated and he returned to Iowa. He took all of his personal belongings with him, the bonds, and one-half of the checking account. There is no evidence that decedent ever returned to Arkansas. The trial court found that decedent did not intend to return to Arkansas. From this evidence, it is reasonable to infer that both his residence and domicile were in Iowa at the time of service.

Decedent may have established a residence while in Arkansas, but it is reasonable to infer that he did not have

a domicile there at the time of service. Therefore, we find that the trial court did not err when it determined Arkansas lacked in personam jurisdiction.

Furthermore, contrary to claimant's argument, even if Arkansas had determined that it was the domicile of decedent, in the absence of personal jurisdiction, the district court was not precluded from re-examining the question of domicile. Restatement (Second) of Conflicts Section 71 comment b. The forum correctly applied its own rules of domicile when determining the judicial jurisdiction of Arkansas. Restatement (Second) of Conflicts Section 13 comment b. Having correctly applied the law to the facts, we find the trial court did not err on this issue.

II. Claimant also contends that the trial court erred in concluding that decedent had not made a gift to claimant

of a property interest in the bonds. She claims that Arkansas law, via its divorce decree, had formally adjudicated the bonds as jointly-owned property. Similarly, according to the claimant, Iowa law supports the finding of a gift to her of the bonds. Therefore, she is seeking her share of the money from the bonds.

Since we have already determined that the Arkansas decree was void with regard to the ownership of the bonds, we do not need to discuss further her claim that Arkansas law determined the bonds to be jointly owned property with regard to Iowa law.

The trial court concluded that decedent, whose name appeared on the bonds as a co-owner, could cash the bonds without the knowledge or consent of the claimant. This result is a correct application of the law regarding bonds.

Where bonds are registered in two or more names, they are considered co-owned property, which is not the equivalent of joint tenancy under state law. United States v. Stockyards Bank of Louisville, 231 F. 2d 628, 630 (6th Cir. 1956).

To meet the requirements of a gift, there must be: (1) donative intent; (2) delivery; and (3) acceptance. Raim v. Stancel, 339 N.W.2d 621, 623 (Iowa App. 1983). The intent of the grantor is the controlling element. If there is a condition as to the vesting of title of the property, the gift fails. Id. The donor must have a clear intention to pass all right, title, and dominion over the gift to the donee. Varvaris v. Varvaris, 255 Iowa 800, 803, 124 N.W.2d 163, 165 (1963).

By leaving his name on the bonds as co-owner, decedent retained control over the bonds. The extent of his ownership is a question of fact. Stockyards Bank, 231 F. 2d at 630. One owner may as a matter of fact be the sole owner, a half-

owner, or some other fractional owner. "Any person whose name appears on the bonds as a co-owner may cash the bonds without the knowledge or consent of the other party." Id. This ability to cash in the bonds is evidence of decedent's intent not to pass all right, title, and dominion over the gift to the claimant.

Substantial evidence supports the trial court's conclusion that no gift was made. The bonds were placed in a jointly-held safety deposit box. As joint lessee of the box, the bank could not prevent decedent from removing the bonds. Therefore, the trial court found both parties had equal access to them.

Decedent owned the bonds before he married the claimant. He was the sole contributor towards the purchase of them. Claimant testified that she would not have cashed them without discussing it with the decedent. Clearly decedent did not relinquish control over the bonds. No gift was completed. Construing the evidence in the light most favorable to the trial court, we find that

substantial evidence exists to support the trial court's decision. We find no error in the application of the law. Therefore, the decision of the trial court is affirmed.

AFFIRMED.

APPENDIX 2

IN THE SUPREME COURT OF IOWA

No. 87-1416

O R D E R

ILEENE GRAY, formerly
ILEENE HEFFRON,
Appellant,

vs.

HARRY ROTH, Fiduciary of the Estate
of **JOSEPH HEFFRON,**
Appellee.

F I L E D
Mar 31 1989
Clerk Supreme
Court

After consideration by this court en banc, further review of the above-captioned case is hereby denied.

Dated this 31st day of March, 1989.

THE SUPREME COURT OF IOWA

By /s/
Arthur A. McGiverin,
Chief Justice

Copies to:
Thomas C. Fritzsche
300 Northwest Bank Tower
Bettendorf, Iowa 52722

Scott H. Walters
1503 Brady Street
Davenport, Iowa 52803

APPENDIX 3

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

ILEENE GRAY, formerly ILEENE HEFFRON,	) F I L E D Sep 29 1987
Claimant,	) Marlene K. Nelson Clerk District Court
vs.	) Scott County Iowa
HARRY ROTH, Fiduciary of the Estate of Joseph Heffron,	) PROBATE No. 50559
Defendant.	) FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ENTRY.

This claim having been previously tried to the Court, Claimant appearing in person and by her attorney Thomas C. Fritzsche and Defendant appearing in person and by his attorney Mark G. Gebo, and the Court having examined and inspected the pleadings, and the exhibits, heard the evidence and reviewed briefs and arguments of counsel previously submitted on identical issues in motions for summary judgment, and being fully advised find:

Claimant, the divorced wife of

decedent, makes claim in decedent's estate for one-half the value of certain U.S. Savings Bonds and interest thereon, allegedly owned jointly by said parties either as a result of the provisions of the Decree of Divorce terminating their marriage or as gifted property during their marriage, which bonds had previously been redeemed by decedent and for which he has made no payment nor accounting to Claimant of her claimed interest. Defendant resists, acknowledging the decree dissolving the parties' marriage but collateral (sic) attacking the personal jurisdiction of that court over decedent and alleging said decree to be void as to the purported property disposition terms contained therein. Further, that under the circumstances disclosed by the evidence, no gift was ever made nor intended of the subject

bonds.

At the conclusion of Claimant's evidence, conceding no competent evidence had been produced to establish a violation of U. S. Treasury regulations probative of Claimant's alleged rights in the bonds, the Court dismissed that part of Claimant's claim.

Decedent was married some forty years to Claimant's sister prior to his marriage to Claimant. Claimant and her husband visited regularly for the ten or twelve years decedent and his wife resided in Davenport, until about 1942 when decedent and his wife moved to Alaska, residing there until 1965. After her death, decedent visited Claimant at her home in Arkansas; from 1965 to the time they were married, she saw decedent about twice a year when he would stop for a two- to four-week visit in the fall and spring on the way to Texas, where he

wintered. At the time of this marriage, decedent had in his possession approximately $48,000 face value of Series E U.S. Savings Bonds comprising the bulk of assets accumulated by decedent and his first wife.

Defendant, executor of decedent's estate, maintained his residence at 921 E. 29th Street, Davenport, Iowa, and owned about 91 acres located on the Wapsipinicon River in Clinton County, Iowa. This property originally had two cottages, one owned by executor and the other owned by decedent' cousin. Executor first became acquainted with decedent in about 1963 at a time when decedent and his wife would stay with decedent's cousin in his cottage. That cottage subsequently was destroyed and not rebuilt. In 1967 decedent asked executor if it would be all right if he lived in his camper on that property

when he was not traveling south, and it was agreed he could do it if he helped around the place as a handyman doing manintenance, repairs and wood chopping. Except for 1977, when decedent was gone ten months and resided in Arkansas, he maintained his residence at this Clinton County location. While in Iowa, decedent used his cousin's address on his driver's license, but used a DeWitt address at times and Roth's address for mail and tax returns. In 1982, because of his declining health, decedent moved to an apartment in DeWitt, Iowa.

Claimant and decedent had mutual friends in DeWitt. In the late spring or early summer of 1977, while Claimant was visiting in DeWitt, she came to the Wapsi property and stayed overnight. A brief relationship developed between Claimant and executor, which was mutually terminated after her return to

Arkansas and the exchange of a few letters.

At about this same time, Claimant and decedent became reacquainted which led to an exchange of letters concerning continuing their relationship on a more permanent basis, Claimant's Exhibit Nos. 1 and 2. As a result of this developing relationship, decedent left Iowa for Claimant's Arkansas residence, and they were married in Arkansas August 3, 1977. The parties resided in Claimant's mobile home which she had owned prior to the marriage. Both parties contributed to maintenance of the marital home; decedent paid family expenses. Decedent had enjoyed a lifetime of camping and fishing, and Claimant shared that interest. Together they purchased a motor home, Claimant's Exhibit No. 3, Claimant trading in her automobile and decedent paying the balance from his savings.

Claimant was aware, through their long relationship, that decedent occasionally abused the use of alcoholic beverages and could become verbally and physically abusive when intoxicated. Prior to their marriage, the parties had discussed their relative financial condition. Although Claimant had a modest savings account, she was reassured that decedent would be bringing some financial stability to her life if they married, as a result of his savings, pension and social security checks, and U.S. Savings Bonds. Some six weeks after their marriage, decedent surrendered the U.S. Savings Bonds to a local bank for reissuance in his and Claimant's name as co-owners. When re-issued, these bonds were kept in Claimant's previously maintained safety deposit box with each party having equal right, if not access, thereto.

The marriage did not satisfy the apparent expectations of either party. Claimant complained of decedent's excessive drinking, physical and verbal abuse, and lack of personal hygiene, and decedent suffered the loss of a solitary free spirit which he had previously enjoyed. On May 24, 1978, decedent got in his van and drove back to Iowa, having first obtained access to the safety deposit box with Claimant's key and removing therefrom all of the bonds as well as approximately one-half the cash balance of the parties' checking account. He left behind the motor home, one-half the checking account balance, one of his pension and social security checks, and his bride of less then ten months. There is no evidence decedent ever returned to Arkansas.

When Claimant that date realized decedent had left, she assumed he was

gone for good. She quickly contacted her bank to request that the checking account be frozen and that decedent be denied access to the safety deposit box. To her distress, not only had decedent already withdrawn approximately half of the funds from the checking account, she was informed the bank could not deny him access to the safety deposit box, and the money, bonds and decedent were, temporarily at least, irretrievably beyond her control.

Claimant consulted an attorney and commenced divorce proceedings on June 2, 1978. a restraining order was secured June 6, 1978, enjoining each party from selling, encumbering, mortgaging, contracting to sell or otherwise disposing of, or removing from the jurisdiction of the court, any property belonging to the parties. A copy of the Complaint and Summons was left June 7, 1978 with the

Sheriff of Lonoke County with instructions to serve the same on decedent, indicating that it was believed decedent "will come in & pick up" and accordingly accept personal service of the summons. Decedent, however, had no intention of returning to Arkansas, service in Arkansas was unsuccessful, and service of notice of the pending action was made by publication on July 14, 21, 28 and August 4, 1978 in the Cabot Star Herald, Proof of Publication being filed September 1, 1978. Claimant having learned form their mutual friend in DeWitt that decedent had returned to Iowa, furnished his address to the Arkansas court-appointed attorney ad litem, who by certified mail, return receipt requested, on July 26, 1978 notified decedent of the pending divorce action. Decedent retained Attorney Jacob H. Jepsen to advise him regarding the matter, prompting an exchange of

correspondence between the parties' attorneys more fully set out in the six letters marked as Exhibit B and attached to the Joint and Trial Stipulations. These letters can be categorized only as unsuccessful negotiations toward solving the parties' property ownership and distribution dispute.

Decedent cashed these bonds between July 31 and August 22, 1978. On September 14, 1978, Claimant procured her default divorce decree from decedent which recited, as here pertinent:

> "On this day comes the plaintiff, Ileene Heffron, in person and by her solicitors, Rice & Batton, P.A., and the defendant, Joseph Heffron, appears not nor by counsel; and it being shown to the court that constructive service by warning order and notice by publication has been had upon the defendant in the time and manner required by law; that more than thirty (30) days have elapsed since the filing of the complaint herein and notice to defendant thereof; therefore said cause is submitted to the court upon the complaint of the plaintiff, Ileene Heffron, proof of publication

> and the report of the attorney ad litem, . . . and the court, after being well and sufficiently advised as to all matters of fact herein, doth find:
>
> That the plaintiff is a resident and domiciliary of the state of Arkansas and the court has complete jurisdiction of the necessary parties hereto and the subject matter of the cause of this action . . .
>
> . . . That there are bonds jointly owned by the parties which should remain jointly owned, subject to further orders of the court; . . .
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the court . . . the bonds owned by the parties shall remain jointly owned, subject to further orders of the court; . . . ."

On September 19, 1978, Claimant's attorney wrote decedent's attorney stating there was no chance of reconciliation "so we have proceeded to enter a divorce decree without adjudicating the property rights on the jointly owned bonds. She is content to leave them as jointly owned property." (Emphasis supplied) The letter enclosed a copy of the decree. From that

date forward, Claimant made no demand on decedent for her property interest in these bonds or any demand for an accounting to her of her interest in these bonds, until she filed her claim in probate on September 4, 1984, six years later.

Claimant correctly contends that a divorce decree regularly procured pursuant to the law of a sister state is entitled to full faith and credit in Iowa. Williams v. Williams, 317 U.S. 287, 87 L.Ed. 279, 63 S.Ct. 207 (1942); and, the Iowa Supreme Court has specifically held that a party seeking to collaterally invalid (sic) a foreign divorce decree on lack of jurisdiction grounds has a heavy burden. Cooper v. Cooper, 217 N.W.2d 584 (Iowa 1974). It is equally clear that the marriage status of the parties within the state gives the Court jurisdiction in rem, and the domicile of one of the parties is

sufficient to establish jurisdiction over the marriage for the purpose of granting a divorce. However, a Court cannot adjudicate a personal claim or obligation unless it can exercise in personam jurisdiction of the defendant. Though the marriage might be dissolved, a court which is not exercising in personam jurisdiction has no authority to adjudicate defendant's property rights. To the extent that a decree purports to do so, it is void. Brown v. Brown, 279 N.W.2d 819 (Iowa 1978); Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L.Ed.2d 1456, 17 S.Ct. 1360 (1957). Constructive notice of the divorce proceeding given decedent was insufficient to confer in personam jurisdiction over him in an Arkansas court. In Re Marriage of Vogel, 293 N.W.2d 215 (1980). Claimant's reliance on Norris v. Norris, 273 N.W. 2d 708, 709 (Minn. 1937), is misplaced. That collateral attack on the

personal jurisdiction of the Arkansas court to adjudicate property rights between the parties because the divorce was procured by fraud of both parties, was defeated, each party having conferred personal jurisdiction by their appearance.

Pursuant to government regulation, where bonds are registered in two or more names they are to be considered co-owned property, which is not the equivalent of a joint tenancy under state law. United States v. Stockyards Bank of Louisville, 231 F.2d 628 (6th Cir. 1956). The extent of the property interest of each co-owner is a question of fact, not of law. One co-owner may as a matter of fact be the sole owner of the bond, he may be a half owner, he may have some other fractional ownership. Any person whose name appears on the bonds may cash the bonds without the knowledge or consent of the other party. The interest of a co-owner on a

bond is therefore a defeasible interest, nothing else appearing.

To constitute a gift, the donor must have a clear intention to pass all right, title and dominion over the gift to the donee. Raim v. Stancel, 339 N.W.2d 621 (Ct. of App. Iowa 1983). The making of a gift involves donative intent, delivery and acceptance, with the intent of the grantor being the controlling element in the delivery of a gift.

Based upon constructive notice only, the Arkansas court was without jurisdiction over the person of decedent and could not affect his rights in any property of the marriage, regardless of any decree recitations. Claimant's then counsel, in fact, conceded as much in his letter to attorney Jepsen of September 19, 1978.

At the time of parties' marriage, decedent owned the bonds outright.

Claimant asserts that at the time the bonds were surrendered by decedent and reissued in his and her names as co-owners, decedent made a gift to her of that property. Claimant cannot explain if these bonds were given to her, why decedent's name was still on them as a co-owner. The bonds were kept in a safety deposit box to which each had equal access for about eight months, and never disturbed. Though Claimant concedes she and decedent had no discussion of her right or ability to cash the bonds immediately at her choice, she acknowledged she would talk to decedent first before she attempted to cash a bond assuming if she wanted to cash one, he would tell her it was all right to cash the bond. It seems clear that Claimant, at least, did not at the time of the purported gift or immediately subsequent thereto, consider her's to be an

unequivocable right to use the bonds as her own. Executor contends placing Claimant's name on the bonds as co-owner was nothing more than decedent's decision to distribute the property to Claimant should she survive him, in lieu of having the property passed through his estate to be shared with remote relatives. The Court concludes form all the evidence that no gift was ever made or intended at the time Claimant's name was placed on the bonds as co-owner, that decedent as sole contributor to the asset was the sole owner of same, and that decedent, as owner and being in possession of the bonds, could cash the same and use the proceeds without regard to Claimant's alleged interest therein.

This marriage was short-lived. Each party brought to the marriage an expectation that each would fill some special and personal need of the other

party, and that each party would make a financial contribution to its success. Claimant furnished the mobile home, and a portion of the purchase price of the motor home. Decedent paid the balance of that motor home, and paid all of the family expenses during the marriage. When they parted, each party received approximately one-half of the cash in the checking account, Claimant retained her mobile home and both parties' interest in the motor home, as well as one pension and social security check belonging to decedent. Decedent, essentially, left with the van and bonds he had owned prior to the marriage. Under these facts and circumstances, the Court concludes the property settlement arranged by the parties to be fair, just and equitable at that time.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Claimant's action to

establish her claim in probate, denied by executor, should be and the same is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this action, taxed by the Clerk of Court in the amount of $_____, are hereby assessed against Claimant.

Dated at Davenport, Iowa, this 29 day of September, 1987.

/s/ James R. Havercamp
Judge, of the
Iowa District Court
7th Judicial District

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL
CLERK

No. 88-2138

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ILEENE GRAY, formerly ILEENE HEFFRON,

Petitioner,

v.

HARRY ROTH, Fiduciary of the Estate of Joseph Heffron,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of Record
for Respondent

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(319)323-8348
Counsel of Record
for Respondent

CERTIFICATE OF SERVICE

I, Scott H. Walters, a member of the Bar of the Supreme Court of the United States and counsel of record for Respondent herein, hereby certify that on July 26, 1989, I served three copies of the attached Respondent's Brief in Resistance on Ileene Gray, Petitioner herein, by depositing such copies in the United States Post Office, Davenport, Iowa, with first class postage prepaid, properly addressed to the post office address of Thomas C. Fritzsche, the above-named Petitioner's counsel of record, at 300 Northwest Bank Tower, Bettendorf, Iowa 52722.

All parties required to be served have been served.

Dated July 26, 1989.

Scott H. Walters

Scott H. Walters
1503 Brady Street
Davenport, Iowa 52803

LIST OF PARTIES

Petitioner is the sole appellant in the court below.

Respondent, named by Petitioner as Harry Roth, Fiduciary of The Estate of Josseph Heffron, Defendant-Appellee in the court below, was deceased at the time Petitioner filed her petition for a writ of certiorari; and Northwest Bank & Trust Company of Davenport, Iowa, is the successor fiduciary in the Estate of Joseph Heffron. Pursuant to U.S. Supreme Court Rule 40.3, Northwest Bank & Trust Company should be substituted as Respondent.

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No. 88-2138

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ILEENE GRAY, formerly ILEENE HEFFRON,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner and Decedent were married on August 3, 1977, separated on or about May 24, 1978, and were divorced by decree of the Chancery Court, Lanoke, Arkansas entered on September 13, 1978. At the

time of the separation on May 24, 1978, both parties were residents of Arkansas.

But for for a ten month period when Decedent resided with Claimant in Arkansas in 1977 and 1978, Decedent maintained his residence at property owned by the late Harry Roth, the Fiduciary of Decedent's Estate, located beside the Wapsipinicon River in Clinton County, Iowa, (the "Wapsi Property") from 1967 until 1982, when, due to Decedent's declining health, Decedent moved to an apartment in DeWitt, Iowa. Decedent had agreed with Roth to act as caretaker of the Wapsi property in exchange for being allowed by Roth to reside there.

In May of 1978, Decedent returned to the Wapsi property in Clinton County, Iowa. Decedent resumed his role as caretaker of the Wapsi property in exchange for being allowed to live on the property.

Following Decedent's departure from Arkansas in May of 1978, Petitioner consulted an attorney and commenced divorce proceedings in Arkansas on June 2, 1978. Service of notice of the pending action was made by publication on July 14, 21, 28 and August 4, in the Cabot Star-Herald, Cabot, Arkansas, with Proof of Publication being filed September 1, 1978. Petitioner, having learned from a mutual friend that Decedent had returned to Iowa, furnished, through her attorneys, Harry Roth's Davenport, Iowa, address to the Arkansas court-appointed attorney ad-litem, who, by certified mail, return receipt requested, on July 26, 1978, notified Decedent by warning order of the pending Arkansas divorce proceeding. The attorney ad-litem was appointed for the sole purpose of informing Decedent of the Arkansas divorce proceeding by certified

mailing. Decedent never obtained an Arkansas attorney to represent him in the Arkansas proceedings, and Decedent never filed any pleadings in the Arkansas Court.

Following receipt of said certified letter, Decedent obtained the services of the late Jacob H. Jepsen, a Davenport, Iowa, attorney, who corresponded by mail with Attorney Ben Rice, Petitioner's Arkansas divorce attorney. Attorney Jepsen never filed any pleadings on Decedent's behalf in the Arkansas court.

On September 14, 1978, a default divorce decree was entered by the Arkansas court, ordering bonds owned by the parties to remain jointly owned. The bonds in question, U.S. Series E savings bonds, had been redeemed by Decedent prior to the entry of the Arkansas decree, between a period from July 31, 1978, to August 2, 1978. As

noted by the Iowa trial court, on September 19, 1978, Attorney Rice wrote to Attorney Jepsen, stating, "(We) have proceeded to enter a divorce decree without adjudicating the property rights of the jointly owned bonds." (Pet. App. 28) No evidence was introduced that Decedent ever returned to Arkansas after his May, 1978, departure.

As noted by the Iowa trial court in its decision, the Arkansas court expressly found, "[P]laintiff [Petitioner herein] is a resident and domiciliary of the State of Arkansas and the Court has complete jurisdiction of the necessary parties hereto and the subject matter of this cause of action." (Pet. App. 28) The Arkansas court never found Decedent to be a domiciliary of Arkansas. Petitioner, in her divorce complaint filed in the Arkansas court, had alleged that Decedent and Petioner were residents

of Arkansas, and the Arkansas Court had sustained the allegation in its default decree.

At the time of the marriage of the parties, the bonds at issue were solely owned by Decedent. Petitioner made no contribution for the purchase of the bonds.

Shortly after the marriage and prior to his separation from Petitioner, Decedent re-registered the bonds in co-ownership form between Decedent and Petitioner. The bonds were stored in a safety deposit box leased jointly in Decedent's and Petitioner's names in the First Jacksonville Bank, Jacksonville, Arkansas. On May 24, 1978, prior to Decedent's departure from Arkansas, Decedent removed the bonds from the safety deposit box and took them to Iowa where he subsequently redeemed them.

Until after Decedents death in Iowa on February 3, 1984, Petioner made no effort to enforce the Arkansas decree or procure an interest in the bonds. On September 4, 1988, Petitioner filed a claim in Decedent's estate demanding the sum of $48,000.00 for bonds allegedly held jointly with decedent and awarded to both Claimant and Decedent pursuant to the terms of the Arkansas Dissolution Decree. On December 9, 1984, Petitioner filed an Amplification of Claim claiming one-half the value of the U.S. savings bonds, allegedly owned jointly by Claimant and Decedent either as a result of the provisions of an Arkansas divorce decree dated September 14, 1978, or as a result of a gift to Petitioner from Decedent of a one-half interest in the bonds during their marriage, which bonds had been redeemed by Decedent prior to September 14, 1978, without an accounting

or payment to Petitioner. On September 29, 1987, the trial court ruled against Petitioner on both grounds. (Pet. App. 17-36) The Iowa trial court found the Arkansas divorce decree provisions purporting to affect Decedent's rights in any marital property to be non-binding upon Decedent, as, "Based upon constructive notice only, the Arkansas court was without jurisdiction over the person of the decedent. . . ." (Pet. App. 32)

Petitioner appealed the Iowa trial court's decision, alleging that the trial court had erred in finding the property distribution provisions of the Arkansas decree to be void because of the Arkansas Court's lack of in personam jurisdiciton over Decedent. The Iowa Court of Appeals affirmed the Iowa trial court's decision, finding that, based on constructive notice only, the Arkansas court lacked in

personam jurisdicion over decedent, as decedent was a nonresident and non-domiciliary of Arkansas at the time of such service; and Decedent did not consent to the Arkansas Court's jurisdiction or enter his appearance in the Arkansas proceeding. (Pet. App. 1-14)

Petitioner never raised the issue of the validity of Arkansas "long-arm" jurisdiction in procuring in personam jurisdiction over out-of-state parties to Arkansas divorce proceedings. Petitioner failed to raise this issue at the trial court level. Neither did Petitioner raise this issue on appeal to the Iowa Court of Appeals nor in Petitioner's request for further review by the Iowa Supreme Court. Petitioner has raised this issue for the first time in her petition fora writ of certiorari.

Similarly, Petitioner did not challenge, either in the Iowa trial court, on appeal to the Iowa Court of Appeals, or in her request for further review by the Iowa Supreme Court, the ability of the Iowa trial court to examine and determine Decedent's domicile at the time of constructive service of notice of the Arkansas divorce complaint upon Decedent. Petitioner has raised this issue for the first time in her petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

SUMMARY OF ARGUMENT

Petitioner has improperly raised for the first time in her petition for a writ of certiorari the issue of the Arkansas divorce court's ability, through its long-arm statute, to obtain *in personam* jurisdiction over Decedent while Decedent was in Iowa. Furthermore, the

constructive service of notice employed by Petitioner in serving Decedent with notice of the Arkansas divorce proceedings did not comply with the service requirements of the Arkansas long-arm statute in effect at the time of service. The form of service did not meet with the extraterritorial personal service requirements of the long-arm statutes of other states which allow extraterritorial service of process to obtain in personam jurisdiction over out-of-state parties in divorce proceedings. Petitioner's petition for a writ of certiorari should be denied.

ARGUMENT

In her petition for a writ of certiorari, Petitioner has raised, for the first time, the issue of the ability of the Arkansas divorce court to obtain in personam jurisdiction over an out-of-state defendant, Decedent herein, to an

Arkansas divorce proceeding by service of notice on the out-of-state defendant pursuant to the Arkansas long-arm statute. The U.S. Supreme Court has stated that it will not consider an issue first raised by the petition for certiorari. Heath v Alabama, 474 U.S. 82, 87, 88 L.E. 2d 387, 393, 106 S. Ct. 433 (1985). This issue was never presented by Petitioner at any level in the Iowa courts, and Petitoner may not raise this issue for the first time by her petition for a writ of certiorari.

Had Petitioner argued this issue before the Iowa courts, she would have discovered that the Arkansas long-arm statute in effect which the Arkansas Supreme Court had held applicable to out-of-state spouses whose last matrimonial domicile was Arkansas, was not utilized by Petitioner. In Bunker v. Bunker, 552 S.W. 2d 641 (Arkansas 1977), a case

relied upon by Petitioner, the Bunkers had resided together in Drew County, Arkansas, for seven or eight months until November of 1975, when the defendant "left Arkansas and apparently changed his domicile to Lousiana." Bunker, p. 642 The Arkansas Supreme Court went on to state,

> In January, 1976, Mrs. Bunker filed this suit for divorce, in Drew County, asserting a cause of action for personal indignities that occured while the defendant was domiciled in Arkansas. Her attoneys knew that a valid divorce decree could be obtained in Drew County, which was Mrs. Bunker's domicile and also the last matrimonial domicile. But counsel also wanted to obtain personal judgments for alimony, child support, and attorney's fees. To that end, no attempt was made by to obtain constructive service by warning order, which would have supported a divorce decree only. Instead, service was had upon the Arkansas Secretary of State, pursuant to Act 119 of 1963. Bunker v. Bunker, 552 S.W. 2d 641, 642 (Arkansas 1977) (emphais added).

The Arkansas Supreme Court went on to hold that service of notice made

pursuant to said statute, gave the Arkansas divorce court in personam jurisdiction over the nonresident, non-domiciliary spouse to enter personal judgments against such spouse when Arkansas was the last matrimonial domicile.

The Arkansas long-arm statute cited by Arkansas Supeme Court provides as follows:

> 27-339-1. Service on resident and nonresident defendants out of state - Secretary of state agent for service of process - Procedure.
> (1) Any cause of action arising out of acts done in this State by an individual in this State or by an agent or servant in this State of a foreign corporation may be sued upon in this State, although the defendant has left the State, by process served upon or mailed to the individual or corporation outside the state.
> (2) From and hereafter the passage and approval of this act [Sects. 27-339.1, 27-339.2], any person, resident or nonresident, who commits acts in this State sufficient to give and indidual in this State a cause of action against the person committing said acts, shall have

deemed to have appointed the secretary of state as his agent for service of process on him in any suit arising out of said acts committed by said resident or nonresident.

(3) Service of such process shall be made by serving a copy of the process on the secretary of state and such service shall be sufficient service upon said nonresident person or any resident person, who is [has] subsequently absented himself physically from the State or upon the executor, administrator or other legal representative of his estate, in case he has since deceased, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or his attorney to the defendant at his last known address or to the administrator, executor or other legal representative of the estate in case said person has deceased, and the defendant's return receipt or the return receipt of such administrator, executor or other legal representative of such deceased person is attached to the writ of process and entered and filed in the office of the clerk of the court wherein such cases are brought. The court in which the action is pending may order some continuance as may be necessary to afford the defendant or defendants reasonable opportunity to defend the act.

(4) The secretary of state upon receiving a copy of said service of summons shall also forthwith mail a copy of said summons together with a

> copy of the complaint to the last and best known address of the named defendant in said suit, notifying him of the filing of said suit. (5) Defendants so summoned shall have thirty (30) days in which to answer after service upon them. 1963 Ark. Acts 119, Sect. 1, 332 (current version at Ark. Stat. Ann. Sect. 16-58-120 (1987)

Clearly, the service of notice by Petitioner upon Decedent in the Arkansas divorce proceeding did not comply with the service required by Bunker to obtain in personam jurisdicition over an out-of-state spouse such that the Arkansas divorce court could rule that the savings bonds in issue were to remain jointly owned by Petitioner and Respondent. Petitioner never served the Arkansas Secretary of State with notice or complied with the other provisions as required by the above Arknasas long-arm statute under Bunker.

The Fifth Circuit Court of Appeals has used this form of inquiry in

resolving the issue ofwhether or not a non-forum state must give the personal judgments of a divorce decree rendered in a sister state full faith and credit when service of notice of the divorce proceeding is upon an out-of-state defendant. In Conlon by Conlon v. Heckler, 719 F. 2d 788 (5th Cir. 1983), the Plaintiff-Appellant, a Texas resident and domiciliary, had initiated a divorce proceeding in Texas. Defendant-Appellee, a Vermont resident, had been personally served with notice of the Texas proceeding in Vermont. Plaintiff-Appellant contended that the Texas divorce court had acquired in personam jurisdiction over the Defendant-Appellee by virtue of the Texas long-arm statute. The Court of Appeals, in examining the form of service in question, found that the Texas court had not obtained in personam jurisdition over Defendant-

Appelle. Defendant-Appellee had not been served under the Texas long-arm statute which would have puportedly extended jurisdicition over an out-of-state defendant. Rather, even though said Defendant-Appelle was personally served, such service was made under a procedural rule which did not purport to confer in personam jurisdiciton over an out-of-state defendant. The personal judgments entered by the Texas court were not, therefore, entitled to full faith and credit by Vermont courts. Conlon by Conlon v. Heckler, 719 F. 2d 788, 791-797 (5th Cir. 1983)

While Bunker v Bunker held that the Arkansas long-arm statute could reach ot-of-state defendants to provide an Arkansas divorce court with in personam jurisdicition over an out-of-state defendant where Arkansas was the last matrimonial domicile; under Conlon by

Conlon v. Heckler, that long-arm statute must be utilized before an Arkansas divorce court can obtain personal jurisdiction over an out-of-state defendant to enter enforceable personal judgments against same. Petitioner failed to serve Decedent under the Arkansas long-arm statute held by the Arkansas Supreme Court to give Arkansas divorce courts in personam jurisdiciton over out-of-state, nondomicilary defendants. As the Arkansas divorce court failed to obtain in personam jurisdicition over Decedent, any personal judgments rendered against him were void. Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L.Ed. 2d 1456, 77 S. Ct. 1360, (1957)

Petitioner has asserted that six state supreme courts have considered domestic relations long-arm statutes and have found same to confer in personam jurisdiction over out-of-state spouses.

(Pet. 12-16) In the five state cases cited by Petitioner, the matrimonial long-arm statutes involved required personal service of process upon an out-of-state defendant before the divorce court could obtain personal jurisdiction over an out-of-state defendant. Whitaker v. Whitaker, 230 S.E. 2d 486, 487 (Georgia 1976); Dillon v. Dillon, 176 N.W. 2d 362, 366 (Wisc. 1970); Soule v. Soule, 14 Cal. Rptr. 417, 418 (Cal. App. 1961); Mizner v. Mizner, 439 P. 2d 679, 681 (Nev. 1968); and Mitchim v. Mitchim, 518 S.W. 2d 362, 365 (Texas 1975). Service by certified mail, return receipt requested would have been insufficient to confer in personam jurisdiction under the matrimonial long-arm statutes, and, in all likelihood, statutes allowing such servicemay violate the Constitutional due process requirement of fundamental mandated by this Court in International

Shoe Co. v. Washington, 326 U.S. 310, 90 L.E.d. 95, 66 S.Ct. 154 (1945).

Contrary to Petitioner'a assertion, the decision of the Iowa Court of Appeals in upholding the Iowa trial court's denial of Full Faith and Credit to the personal judgment portion of the Arkansas decree does not conflict with the decisions of other state courts which uphold personal judgments entered pursuant to long-arm statutes, matimonial or otherwise. The Arkansas long-arm statute which the Arkansas Supreme Court has held confers personal jurisdiction over out-of-state defendants in an Arknasas divorce proceeding was not utilized by Petitionere in serving Decedent. Furthermore, the constructive service of notice upon Decedent would no meet with the extraterritorial personal service requirements of the matrimonial long-arm statutes.

II.

SUMMARY OF ARGUMENT

Again, Petitioner has improperly raised for the first time in her petition for a writ of certiorari the issue of the legal propriety of the Iowa trial court's determination of Decedent's domicile at the time he was constructively served with notice of the Arkansas divorce proceeding. Petitioner's assertions to the contrary, the Iowa trial court could determine Decedent's domicile.

Petitioner did not challenge the standing of Respondent to collaterally attack the validity of the Arkansas divorce decree until Petitioner filed his Application for Further Review by the Iowa Supreme Court. Again, Petitioner's contention is without merit, as Respondent had standing to attack the validity of the decree. Petitioner's petition for a writ of certiorari should be denied.

ARGUMENT

In her petition for a writ of certiorari, Petioner has raised, again for the first time, the issue of the legal propriety of the Iowa trial court's examination of Decedent's domicile at the time he was served with notice of the Arkansas divorce proceeding. Petitioner may not raise this issue for the first time in his petition for writ of certiorari. Heath v Alabama, 474 U.S. 82, 87, 88 L.E. 2d 387, 393, 106 S. Ct. 433 (1985) This issue was never presented by Petitioner at any level in the Iowa courts, and Petitoner may not raise this issue for the first time by her petition for a writ of certiorari.

Even had petitioner raised this issue in the Iowa courts, the Iowa trial court was not required to give full faith and credit to the Arkansas divorce decree because decedent was not a domicilary of

Arkansas at the time the Arkansas divorce proceeding was commenced, and the Iowa trial court so found. The Arkansas divorce court never found decedent to be a domiciliary of Arkansas.

The U.S. Supreme Court has held that a divorce decree rendered in one state may be collaterally attacked by proof that the court which rendered the decree had no jurisdiction, even though the record of the proceedings in that court purports to show jurisdiction. Williams v. North Carolina, 325 U.S. 226, 229, 89 L. Ed. 1577, 65 S. Ct. 1092 (1945) (emphasis added). The Court went on to hold,

> As to the truth or existence of a fact, like that of domicil[e], upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asseting its own unquestionable authority, to ascertain the truth or existence of that crucial fact.

Williams v. North Carolina, 322 U.S. 226, 230 (1945). Accordingly, even had the Arkansas Court determined that it was the domicile of Decedent, the trial court, as noted by the Court of Appeals, was not precluded from re-examining the question of decedent's domicile. (Pet. App. 11) See Restatement (Second) of Conlict of Laws Sect. 71, Comment b (1971). The trial court correctly applied its own rules of domicile when determining the judicial jurisdiction of Arkansas. (Pet. App 11) See Restatement (Second) of Conflict of Laws Sect. 13, Comment b (1971).

The issue of the Respondent's standing to attack the validity of the Arkansas divorce decree was never raised by Appellant at trial or in her briefs and oral argument before the Iowa Court of Appeals. Petitioner raised this issue for the first time in her Request for

Further Review by the Iowa Supreme Court. Under Iowa law, issues not presented at trial in the district court cannot be raised or reviewed on appeal; the theory under which a case was tried in trial court will be the theory upon which an appeal is based. Shill v. Careage Corp., 353 N.W. 2d 416, 420 (Iowa 1984) Even issues of constitutional magnitude will not be addressed by the Court of Appeals if not addressed by the trial court. In the Interest of W.E.G., 342 N.W. 2d 900, 901 (Iowa Ct. App. 1983)

Even if the reviewing court were to consider Petitioner's argument of lack of standing by Respondent to collaterally attack the Arkansas decree, the court would find that Respondent had the requisite standing to collaterally attack the Arkansas court's jurisdiction to order a property settlement with regard to the bonds. In Johnson v. Muelberger,

340 U.S. 581, 95 L.Ed. 552, 71 S.Ct. 474 (1951), cited by Petitioner for the proposition that Respondent was without standing under the Full Faith and Credit clause to attack the jurisdiction of the Arkansas court, a daughter of a decedent collaterally attacked the jurisdiction of the sister state court where the divorce decree had been rendered. In said sister state which granted the divorce, decedent had answered the divorce petition on the merits and had full opportunity to contest the jurisdictional issues. Johnson, p. 582. The U.S. Supreme court held that where the decedent had appeared and contested the case on the merits, the decree in that state could not be collaterally attacked by a sister state on jurisdictional grounds under the Full Faith and Credit clause. Johnson, p. 589.

Such is not the case here. It is uncontroverted that Decedent never appeared in the Arkansas proceeding, never answered Petitioner's divorce petition, and never subjected himself to the Arkansas court's jurisdiction. Respondent was not, therefore, precluded from collaterally attacking the jurisdiction of the Arkansas court under Johnson v. Muelberger.

Petitioner next asserts, as she asserted for the first time in her Request for Further Review by the Iowa Supreme Court, that the Arkansas court would hold its decision to be res judicata as to the issues of Decedent's residence and domicile, even though the Arkansas Court made no finding as to Decedent's domicile, and that the equitable principle of laches would apply to bar the re-opening of the Arkansas decree in Arkansas. Under Iowa law,

Appellant may not raise issues on appeal that were not raised in the trial court. Shill v. Careage Corp., 353 N.W. 2d 416, 420 (Iowa 1984). As Respondent has, however, established that the Iowa trial court could collaterally attack the validity of the Arkansas decree for lack of jurisdiction under Williams v. North Carolina, it is irrelevant as to what position the Arkansas court may have taken had it re-examined its decree.

The Iowa courts have followed the mandates of this Court in determining whether or not foreign divorce decreees are entitled to Full Faith and Credit under the U.S. Constitution.

Conclusion

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated July 26, 1989.

SUPREME COURT, U.S.
FILED
SEP 8 1989

No. 88-2138

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ILEENE GRAY, formerly ILEENE HEFFRON,

Petitioner,

v.

NORTHWEST BANK & TRUST COMPANY, Successor Fiduciary of the Estate of Joseph Heffron,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS OF IOWA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CERTIFICATE OF SERVICE

I, Thomas C. Fritzsche, a member of the Bar of the Supreme Court of the United States and counsel of record for Petitioner herein, hereby certify that on September 6, 1989, I served three copies of the attached Petitioner's Reply to Respondent's Brief in Opposition on Respondent, by personal delivery to Scott H. Walters, Esq., 1503 Brady Street, Davenport, Iowa 52803, counsel for Respondent.

All parties required to be served have been served.

Dated September 6, 1989.

Thomas C. Fritzsche

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The principal thrust of Respondent's Brief in Opposition to the grant of certiorari by this Court is that Petitioner is attempting to raise serious constitutional issues for the first time in this court without having raised them in the trial court and state court appellate preceedings. This factual

claim is untrue and is exposed by citation to the record below.[1]

Respondent's claim that new "issues" are being raised for the first time in this court confuses the reality that the single essential constitutional issue of the entitlement of the parties' Arkansas divorce decree to enforcement under the Full Faith and Credit clause of the U.S. Constitution has been at the heart of this case since the start, with the further fact that at various stages of this proceeding, appropriate to the evolving decisions of the trial court and the Iowa Court of Appeals, Petitioner has used varying characterizations of arguments in support of her consistent position that the Arkansas decree is

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1 Pursuant to Supreme Court Rule 19.1, a certified copy of the record below has not yet been filed in this certiorari proceeding. Cited references to the record below are set out in the body of this Reply.

constitutionally entitled to full-faith-and-credit enforcement by the courts of its sister state in Iowa.

Petitioner first raised the essential "full faith and credit" issue pre-trial in her Motion for Partial Summary Judgment filed February 11, 1987. In this Motion at Paragraph 2, Petitioner expressly claimed:

> "2. That as a matter of law the Arkansas decree ordering the Bonds retained in joint ownership between Claimant and decedent is entitled to Full Faith and Credit in this Court and is binding upon the Fiduciary as successor and privy to the decedent."

Respondent resisted this Motion for Partial Summary Judgment by asserting a challenge to the exercise of in personam jurisdiction of the Arkansas court, so that the issue was held over for trial on July 8, 1987. The trial court's decision was rendered on September 29, 1987 (App. 17-36 of Pet. for Cert.)

The trial court in its decision expressly noted the preservation of Petitioner's claim to "full faith and credit". (App. 29 of Pet. for Cert.) However, the trial court ruled that the Arkansas decree was not entitled to full faith and credit by holding as a matter of law that the Arkansas court could not exercise in personam jurisdiction over the decedent by constructive notice only of its divorce proceeding. (App. 30, 32 of Pet. for Cert.).

Petitioner squarely challenged the trial court's erroneous holding on appeal to the Iowa Court of Appeals. Petitioner's challenge went directly to the trial court's erroneous holding and was set out at page 10 of Petitioner's Brief to the Iowa Court of Appeals:

> "The trial court, however, concluded that since the Arkansas divorce decree was 'based upon constructive notice only,' it could not affect his rights in property, regardless of any decree

> recitations. In reaching this conclusion, the trial court makes a gratuitous assumption that the Arkansas court did not have personal jurisdiction over decedent. It is fundamental, however, in constitutional law that a court may exercise personal jurisdiction over the residents of its own state. Almost fifty years ago the United States Supreme Court recognized that domicile within a state is alone sufficient nexus to bring an absent defendant within the reach of the forum state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Milliken v. Meyer, 311 U.S. 457, 462,85 L.Ed. 278,283 (1940). With both decedent and Claimant Arkansas residents, the Arkansas court had full personal jurisdiction to determine the property rights of the parties."

Petitioner unmistakably preserved the consitutional issue on appeal when she concluded her argument:

> "The trial court erred in not giving full faith and credit to the Arkansas divorce decree, commanding that the bonds remain in joint tenancy until further order of court." (Pet. Br. to the Iowa Court of Appeals at 23).

In its decision on appeal, the Iowa Court of Appeals affirmed the trial court judgment's refusal to accord full faith and credit to the Arkansas decree's property division provisions, but it did so on an entirely differently basis than that of the trial court. The Iowa Court of Appeals decision impliedly recognized the validity of Petitioner's argument that personal jurisdiction could be acquired over an absent defendant, consistent with due process, by means other than personal service (in this case publication and certified mail with proof of receipt by return mail).

The Iowa Court of Appeals side-stepped the issue of consititutionally valid substituted service, and refused to accord full faith and credit to the Arkansas decree as it found an absence of jurisdictional predicate or "sufficient relationships" for the State of Arkansas

to exercise its judicial power over the person of the decedent. (App. 7, 8 of Pet. for Cert.) This conclusion, announced for the first time in the Iowa Court of Appeals decision, was challenged by Petitioner's Application (to the Iowa Supreme Court) for Further Review.[2]

In Petitioner's Application for Further Review, she squarely challenged the trial court's and Iowa Court of Appeals' ability to upset the express finding of the Arkansas court on the face of its decree as to its jurisdictional predicate, without a "heavy burden of clear and convincing evidence." This challenge was primarily argued in terms

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2 The Iowa Rules of Appellate Procedure do not allow for rehearing petitions before the Iowa Court of Appeals. The only state recourse for challenging erroneous applications of fact or law is via a Rule 402 Application for Further Review to the Iowa Supreme Court. That Court refused to accept the case for further reiew by order entered on March 31, 1989. (App. 16 of Pet. for Cert.)

of controlling constitutional precedents of the Iowa Supreme Court. However, Petitioner also preserved a federal constitutional challenge when she expressly argued at page 6 of her Application (to the Iowa Supreme Court) for Further Review:

> "This requirement of clear and convincing evidence may be constitutionally mandated via the Federal Full Faith and Credit clause. Compare the plurality opinions of the United States Supreme Court in Williams v. North Carolina, 325 U.S. 226, 239 (1945). While a three justice dissent strongly argued against collateral attack on foreign divorce decrees, the three justices who supported the court's concurring opinion insisted on a high standard of proof in establishing what amounted to a claim of fraudulently invoked jurisdiction. See 325 U.S. at 240."

Ironically, it is Respondent, and not Petitioner, who for the first time in this certiorari proceeding raises a wholly new issue for which there is no basis in the record below.

At trial there was no challenge by Respondent to the mechanical question of compliance by the Arkansas court with the Arkansas statutory procedures for service of process on out-of-state individuals. Thus in Petitioner's Brief to the Iowa Court of Apeals she noted at page 12:

> "The Fiduciary did not challenge at trial the regularity of the Arkansas procedure whereby that state could exercise personal jurisdiction over its absent residents via substituted service. [The Iowa Rules of Civil Procedure provides a method of substituted service on residents of the State of Iowa who depart therefrom with intent to delay or avoid service. See Rule 60 (h).]" (footnote in brackets)

Respondent has raised the totally novel question of statutory compliance with the mechanics of Arkansas service-of-process procedure for the very first time in its Brief in Opposition. See Br. in Opp. pp. 12-19. In raising this new issue Respondent apparently asks this Court to take judicial notice of a

foreign statute, Ark. Act 119 of 1963, the statute cited at pp. 14-16 of Br. in Opp. This statute was not placed before the Iowa trial or appellate courts for consideration, and consequently is not of record. Further, judicial notice will not be taken by this court in reviewing decisions of a state court, like Iowa in this case, of statutes of another state which were not set up in the state court and of which the state court did not take judicial notice. Bothwell v. Buckbee, Mears Co., 275 U.S.274, 278 (1927).[3]

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3 At trial Petitioner relied on the presumed validity of the Arkansas divorce decree which was regular on its face as to jurisdictional findings. Respondent had the heavy burden of challenging this decree's irregularity and never undertook a challenge on the basis of failure to comply with Arkansas statutory procedures. Constructive service in this case was by published warning order and certified mail service with return receipt acknowledged to the decedent in Iowa. There was never any claim by Peititioner that such service was in accord with the specific statute belatedly cited by Respondent for the first time in its Br. in Opp. However, the actual out-of-state service on decedent was in (cont'd)

Failure to comply with the specifics of Arkansas statutory procedure was never an issue in this case, because Respondent chose at trial not to raise this issue. The issue at trial was strictly whether or not personal jurisdiction could be constitutionally invoked via constructive service consisting of registered mail service with proof of return receipt. After spending nine pages of its Brief in Opposition (pp. 12-20) attacking the "red herring" issue of failure to comply with a specific Arkansas statute not relied on by Petitioner,

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3 (cont'd) compliance with an alternate "long-arm" Arkansas statute governing service of process, Ark. Act 101 of 1963, passed in the same legislative session as the statute cited by Respondent. Ark. Act 101 of 1963 provides at Section 2(A)(1): "When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: ...(c) by any form of mail addressed to the person to be served and requiring a signed receipt". For a discussion of these alternative Arkansas process statutes and their use in perfecting personal jurisdiction over out-of-state defendants, see Note, "Personal Jurisdiction Over Out-of-State Defendants," 18 Ark. L. Rev. 124 (1964).

Respondent casually suggests:

> "Service by certified mail, return receipt requested would have been insufficient to confer in personam jurisdiction under the matrimonial long-arm statutes, and in all likelihood, statutes allowing such service may violate the Constitutional due precess requirement of fundamental (sic) mandated by this court in International Shoe Co. v. Washington, 326 U.S. 310...(1945) (emphasis added). (Br. in Opp. 20-21).

This casual underscored suggestion of Respondent is submitted without any authority at all! Petitioner believes that the Court's historic decision in Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 314-15 (1950) is entirely dispositive of this issue. The Mullane test for notice complianace with due process has been repeatedly cited by subsequent courts:

> "An elementary and fundamental requirement of due process in any preoceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise

> interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314.

The Mullane court sanctioned service via ordinary mail to trust beneficiaries with known addresses, and reiterated express constitutional approval for substituted service outside a forum state such as was sanctioned by the court in Milliken v. Meyer, 311 U.S. 457 (1940). In the instant case decedent actually received the summons and complaint in the Arkansas divorce proceeding, retained local Iowa counsel who negotiated with Petitioner's Arkansas counsel, and made a counseled decision to let the Arkansas action proceed to a default judgment, a copy of which he received and never challenged during the six remaining years of his life.

The important and substantial question presented to this Court is not the due process effectiveness of substituted service. This issue was impliedly resolved by the Iowa Court of Appeals when it did not affirm the trial court's result on that basis. The critical question for this court's attention is the basis upon which the Iowa Court of Appeals rested its affirmance--the held absence of a constitutional jurisdictional predicate in the factual context where a foreign court has determined otherwise without fraud, and when the factual record clearly demonstrates those "certain minimum contacts" (last matrimonial domicile or domicile of the decedent) which will constitutionally support the proper

exercise of a foreign court's jurisdiction.

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September 6, 1989